

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

VICTORIA NANEZ,

Plaintiff,

vs.

No. CIV-01-1340 JEC/DJS

BEN FRANKLIN STORES, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Movant Jerry Hailey's Motion to Dismiss, filed Aug. 28, 2002 (*Doc. 15*), and Plaintiff's Motion and Memorandum in Support of Motion for Leave to File Amended Pleading, filed Sept. 2, 2002 (*Doc. 20*). The Court finds both motions well taken and they are, therefore, granted.

I. Background

On November 28, 2001, Plaintiff filed suit against Defendant Ben Franklin Stores, Inc., alleging age and employment discrimination, breach of contract, and *prima facie* tort. Ben Franklin Stores, Inc. failed to respond to the complaint and the Court entered a Default Judgment against Ben Franklin Stores, Inc. Default J., filed Feb. 20, 2002 (*Doc. 9*). On May 31, 2002, Plaintiff filed a Motion to Award Damage Amount (*Doc. 10*). The Court declined to award an amount at that time and instead ordered that Plaintiff's counsel "shall investigate further as to why Ben Franklin Stores, Inc. did not file an answer to the Complaint and shall advise the Court as soon as possible regarding this matter." Order, filed July 29, 2002 (*Doc. 13*). On August 8, 2002, Jerry Hailey was served a copy of the summons and complaint which named Ben Franklin Stores, Inc. as Defendant. Subsequently, the parties filed the motions now before the Court.

II. Discussion

A. Motion to Dismiss

Movant Jerry Hailey was served with a summons and complaint naming Ben Franklin Stores, Inc. as Defendant on August 8, 2002. However, Mr. Hailey claims that he is not an agent of Ben Franklin Stores, Inc. and has no affiliation with Ben Franklin Stores, Inc. Mot. Dismiss, Ex. A. In fact, Mr. Hailey asserts that Ben Franklin Stores, Inc. is a former corporation that filed bankruptcy in 1996 and no longer exists. *Id.* He further asserts that the proper party in interest is J & K Sales of New Mexico d/b/a Ben Franklin Crafts and it is Ben Franklin Crafts, not Ben Franklin Stores, Inc. that employed Plaintiff at 6 Hilltop Plaza Shopping Center, Clovis, New Mexico. *Id.* For these reasons, Mr. Hailey moves the Court to dismiss Defendant Ben Franklin Stores, Inc. from this action as an improper defendant.

Plaintiff responds by arguing that the motion should be denied pursuant to D.N.M.LR-CIV. 7.5(b), which Plaintiff quotes as providing that “failure to serve...a brief in support of any motion constitutes consent to deny the motion.” Pl’s. Resp. Plaintiff misquotes the Rule, however, and offers no other support for her position. New Mexico Local Civil Rule 7.5 (b) provides that a “[m]ovant must submit evidence, in the form of affidavits, deposition excerpts, or other documents, in support of allegations of fact.” As discussed above, Mr. Hailey attached his affidavit to the motion, in which he states that he is “not an officer, director, employee, or agent of Ben Franklin Stores, Inc.” but is instead “a director and officer of J & K Sales of New Mexico,” a company that is “operating a business under the name of Ben Franklin Crafts at 6 Hilltop Plaza Shopping Center, Clovis New Mexico.” Mot. Dismiss, Ex. A. Mr. Hailey’s affidavit provides support for his factual allegation that Ben Franklin Stores, Inc. did not employ Plaintiff and it is, thus, an improper defendant in this matter.

Lacking any evidence to contradict Mr. Hailey's affidavit, the Court grants Mr. Hailey's Motion to Dismiss Ben Franklin Stores, Inc. as a defendant in this case.

B. Motion for Leave to File Amended Pleading

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend the pleadings after the time for amending as a matter of course "only by leave of court or by written consent of the adverse party," but that "leave to amend shall be freely given when justice so requires." Fed.R.Civ.P.15(a); *Foman v. Davis*, 371 U.S. 178, 182.

Plaintiff moves the Court to allow her to amend her complaint to substitute J & K Sales of New Mexico d/b/a Ben Franklin Crafts for Ben Franklin Stores, Inc. as Defendant. The Court finds no sufficient evidence of prejudice if Plaintiff is allowed to amend her complaint to name the proper defendant in this case. Therefore, Plaintiff is granted leave to file an amended pleading.

Wherefore,

IT IS ORDERED that Movant Jerry Hailey's Motion to Dismiss, filed Aug. 28, 2002 (*Doc. 15*) is granted and Defendant Ben Franklin Stores, Inc. is dismissed from this action with prejudice.

IT IS FURTHER ORDERED that Plaintiff's Motion and Memorandum in Support of Motion for Leave to File Amended Pleading, filed Sept. 23, 2002 (*Doc. 20*), is granted.

IT IS FURTHER ORDERED that this Court's Order entering Default Judgment against Ben Franklin Stores, Inc., filed Feb. 20, 2002 (*Doc. 9*), is vacated.

IT IS FURTHER ORDERED that Plaintiff's Motion to Impose Damage Award, filed May 31, 2002 (*Doc. #10*), is denied as moot.

DATED January 15, 2003.



SENIOR UNITED STATES DISTRICT JUDGE

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